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Counsel to the Debtors and  
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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

- - - - - X  
In re: : Chapter 11  
:  
CIRCUIT CITY STORES, INC., : Case No. 08-35653 (KRH)  
et al., :  
:  
Debtors. : Jointly Administered  
- - - - - X

**DEBTORS' SIXTY-FIRST OMNIBUS OBJECTION (RECLASSIFICATION  
OF CERTAIN ALLEGED 503(B)(9) CLAIMS TO GENERAL  
UNSECURED, NON-PRIORITY CLAIMS)**

The debtors and debtors in possession in the  
above-captioned cases (collectively, the "Debtors")<sup>1</sup>,

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<sup>1</sup> The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN,  
(cont'd)

hereby file the Debtors' Sixty-First Omnibus Objection (Reclassification of Certain Alleged 503(b)(9) Claims to General Unsecured, Non-priority Claims) (the "Objection"), and hereby move this Court, pursuant to sections 105 and 503(b)(9) of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (as amended, the "Bankruptcy Code"), Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Local Bankruptcy Rule 3007-1, for an order, the proposed form of which is attached hereto as Exhibit A, granting the relief sought by this Objection. In support of the Objection, the Debtors respectfully state as follows:

#### **JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a

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*(cont'd from previous page)*

Inc. (0875), Ventoux International, Inc. (1838), Circuit City Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC Distribution Company of Virginia, Inc. (2821), Circuit City Properties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc. (6796), Sky Venture Corp. (0311), PRAHS, Inc. (n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courchevel, LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512). The address for Circuit City Stores West Coast, Inc. is 9250 Sheridan Boulevard, Westminster, Colorado 80031. For all other Debtors, the address was 9950 Mayland Drive, Richmond, Virginia 23233 and currently is 4951 Lake Brook Drive, Glen Allen, VA 23060.

core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief requested herein are Bankruptcy Code sections 105 and 503(b)(9), Bankruptcy Rule 3007, and Local Bankruptcy Rule 3007-1.

#### **BACKGROUND**

2. On November 10, 2008 (the "Petition Date"), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code.

3. On November 12, 2008, the Office of the United States Trustee for the Eastern District of Virginia appointed a statutory committee of unsecured creditors (the "Creditors' Committee"). To date, no trustee or examiner has been appointed in these chapter 11 cases.

4. On January 16, 2009, the Court authorized the Debtors, among other things, to conduct going out of business sales at the Debtors' remaining 567 stores pursuant to an agency agreement (the "Agency Agreement") between the Debtors and a joint venture, as agent (the

"Agent"). On January 17, 2009, the Agent commenced going out of business sales pursuant to the Agency Agreement at the Debtors remaining stores. As of on or about March 8, 2009, the going out of business sales had concluded.

5. On September 29, 2009, the Debtors and the Creditors Committee filed the First Amended Joint Plan of Liquidation of Circuit City Stores, Inc. and its Affiliated Debtors and Debtors In Possession and its Official Committee of Creditors Holding General Unsecured Claims (the "Plan"). The associated disclosure statement (the "Disclosure Statement") was approved on September 24, 2009, and confirmation on the Plan is currently scheduled for December 21, 2009.

6. Generally, the Plan provides for the liquidation of the Debtors under chapter 11 of the Bankruptcy Code.

#### **RELIEF REQUESTED**

7. Subject to the reservation of rights set forth herein, by this Objection, the Debtors seek entry of an order, in substantially the form annexed as Exhibit A, reclassifying the claims set forth on Exhibit

C, which were asserted as administrative expenses under Bankruptcy Code section 503(b)(9) (the "Lease Claims"), to general unsecured, non-priority claims.

8. For ease of reference, attached as Exhibit B is an alphabetical listing of all claimants whose Lease Claims are included in this Objection (the "Claimants"), with a cross-reference by claim number.

#### **BASIS FOR RELIEF**

9. Currently, the Debtors are engaged in a thorough review of all claims filed against their estates, including administrative expense claims, to determine the validity of such claims. As part of this process, the Debtors are diligently reviewing claims filed pursuant to Bankruptcy Code section 503(b)(9).

10. After reviewing numerous 503(b)(9) claims, their supporting documentation and the Debtors' books and records, the Debtors have determined that the Lease Claims identified on Exhibit B do not satisfy the requirements of Bankruptcy Code section 503(b)(9). Specifically, the Lease Claims are based on the leasing of goods to the Debtors. Thus, such Claims are not based on the sale of goods to the Debtors by the Claimants.

11. Accordingly, the Debtors object to the classification of the Lease Claims as administrative priority claims and request that they be reclassified as general unsecured, non-priority claims.

**APPLICABLE AUTHORITY**

**I. THE LEASE CLAIMS ARE BASED ON GOODS LEASED TO THE DEBTORS, NOT GOODS SOLD.**

12. Bankruptcy Code section 503(b)(9) provides in pertinent part as follows:

(b) After notice and a hearing, there shall be allowed, administrative expenses, . . . including . . .

(9) the value of any goods received by the debtor within 20 days before the commencement of the case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

11 U.S.C. § 503(b)(9). To adequately assert an administrative expense under this section, the creditor must prove, by a preponderance of the evidence, that (1) it provided goods; (2) the debtor received the goods within twenty days of the commencement of the case; and (3) the goods were sold in the ordinary course of the debtor's business. Brown & Cole Stores, LLC v. Associated Grocers, Inc. (In re Brown & Cole Stores,

LLC), 375 B.R. 873, 878 n.7 (B.A.P. 9th Cir. 2007); see also In re Boling Group, L.L.C., 2002 WL 31812671, at \*4. (Bankr. M.D.N.C. 2002) (citing In re Merry-Go-Round Enterprises, Inc., 180 F.3d 149, 157 (4th Cir. 1999))("The burden of proof is on the claimant to establish by a preponderance of the evidence its entitlement to an administrative expense award under 11 U.S.C. § 503(b)."); see also In re SemCrude L.P., 2009 WL 3241674, at \*2 (Bankr. D. Del. October 7, 2009) (citing In re Goody's Clothing Inc., 401 B.R. 131, 133 (Bankr. D. Del. 2009)) (finding that claimants must prove the elements of a 503(b)(9) claim by a preponderance of the evidence)).

13. In evaluating section 503(b)(9) and the definition of "sale", "[t]he presumption . . . is that the debtor's limited resources will be equally distributed among the creditors. Thus, statutory priorities must be narrowly construed." Ford Motor Credit Co. v. Dobbins, 35 F.3d 860, 865 (4th Cir. 1994) (quoting In re James B. Downing & Co., 94 B.R. 515, 519 (Bankr. N.D. Ill. 1988)); see also City of White Plains v. A&S Galleria Real Estate, Inc. (In re Federated Dep't

Stores, Inc.), 270 F.3d 994, 1000 (6th Cir. 2001); In re Amireh, 2008 WL 52706, at \*4 (Bankr. E.D. Va. 2008) ("The court will not expand the reach of the statute beyond the language chosen by Congress.").

14. Consistent with the plain language of the statute, allowed administrative expenses under section 503(b)(9) should only be claims arising from a claimant's sale and delivery of goods to the Debtors, not from leasing goods.

15. As explained below, the Lease Claims are based on goods leased to the Debtors, not on goods sold and, therefore, the Lease Claims should be reclassified as general unsecured, non-priority claims.

**II. THE TERM "SALE" IN SECTION 503(B)(9) SHOULD BE CONSTRUED NARROWLY AND IN CONFORMITY WITH THE DEFINITION OF "SALE" IN THE UCC.**

16. Although the term "sale" is not defined in the Bankruptcy Code, it must be construed narrowly and consistent with Congressional intent. See Ron Pair Enter., Inc. 489 U.S. 235, 242 (1989) (reasoning that statutes should be interpreted based on their plain meaning and in accordance with Congressional intent); see also Ford Motor Credit, 35 F.3d at 865 (holding that



statutory priorities under the Bankruptcy Code must be narrowly construed); In re Federated Dep't Stores, 270 F.3d at 1000 (noting that administrative expense claims under section 503(b) should be strictly construed).

17. The Debtors contend that the proper meaning of "sale" is that meaning found in section 2-106 of the Uniform Commercial Code (the "UCC"). The UCC defines "sale", in pertinent part, as "the passing of title from the seller to the buyer for a price" UCC § 2-106(1).<sup>2</sup>

18. Although the Bankruptcy Code does not define the term "sale", this Court has looked to the UCC for the definition of other terms not defined in the Code. See In re Circuit City Stores, Inc., 2009 WL 3032346, \*6 (Bankr. E.D. Va. Sep. 22, 2009) (Huennekens, J.) (finding that the UCC's definition of "goods" should be used to interpret the scope of section 503(b)(9)). By adopting the UCC's definition of "sale", this Court

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<sup>2</sup> Virginia has adopted the UCC's definition of "sale." See Va. Code Ann. §8.2-106 (2009).

would remain consistent with its earlier decision concerning "goods". See id.<sup>3</sup>

19. Moreover, adopting the UCC's definition of "sale" would be consistent with the only published opinion to address the meaning of "sold" in section 503(b)(9). In Goody's, the Bankruptcy Court concluded that, for purposes of section 503(b)(9), the UCC's definition of "sale" applied for purposes of determining whether goods were "sold to the debtor". See Goody's, 401 B.R. at 136 (citing the UCC and finding that, while the creditor shipped the goods in question to the debtors, the creditor never had title to the goods, and thus could not sell them). Accordingly, the Debtors submit that it is appropriate for this Court to adopt

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<sup>3</sup> Additionally, in other contexts, Courts have interpreted the meaning of words in the Bankruptcy Code with reference to the UCC. See In re Price, \_\_ F.3d \_\_, 2009 WL 975796, \*3 (4<sup>th</sup> Cir. 2009) (relying on North Carolina law, which adopted the UCC, to define the Bankruptcy Code's use of "purchase money security interest"); In re Ellingsen MacLean Oil Co., Inc., 834 F.2d 599, 605 (6<sup>th</sup> Cir. 1987) (relying on UCC to supply the definition for "good faith" contained in 11 U.S.C. § 364(e)); Haywin Textile Prods., Inc. v. Bill's Dollar Stores, Inc. (In re Bill's Dollar Stores, Inc.), 164 B.R. 471, 474 (Bankr. D. Del. 1994) (adopting UCC's definition of the term "receipt" because the Bankruptcy Code does not define the term and the right of reclamation is derived from the UCC).

the UCC's definition of "sale" for purposes of Bankruptcy Code section 503(b)(9).

20. Under the definition of sale, this Court must next determine whether the transactions with the Claimants resulted in goods "sold to the [Debtors]" for purposes of Bankruptcy Code section 503(b)(9). Although the Debtors have been unable to locate an opinion that specifically addressed this issue, courts in the non-bankruptcy context have addressed similar issues and have consistently concluded that a lease transaction is not a "sale". See Reliance Insurance Company v. J.W. Burress, Inc., 443 S.E.2d 143, 145 (Va. 1994) (finding that the lease of certain equipment, although it included an option to purchase, did not qualify as a "contract for sale" under the Virginia version of the UCC until the option was exercised); Leake v. Meredith, 221 Va. 14, 16-17 (Va. 1980) (finding that a chattel lease without an "irrevocable option to buy" was not a sale under the UCC for purposes of applying the warranty provisions therein); Spectrum Press, Inc. v. Troy Garrett T/A Stallion Graphics, 1996 WL 1065609, \*2 (Va. Cir. Ct. 1996) (finding that the warranty provisions of

the UCC did not apply to a contract in which a price was not paid and title was not transferred); Gentry v. Ryder Truck Rental, Inc., 1987 WL 488610, \*1 (citing to Leake and finding that, in a lease similar to this one, the warranty provisions of the UCC did not apply).

21. Here, because title to the Claimants' goods did not transfer to the Debtors, no "sale" occurred. Consequently, the Claimants are not entitled to priority under Bankruptcy Code section 503(b)(9).

### **III. THE LEASE CLAIMS SHOULD BE RECLASSIFIED.**

22. Bankruptcy Code section 105 provides in pertinent part that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

23. In order for the Debtors to efficiently and expeditiously wind up their estates, it is essential for the Debtors to establish the proper liabilities asserted against them. In order to achieve the imperative of finality required by the claims process, the Debtors request that the Lease Claims be

reclassified at this time to general unsecured, non-priority claims.

24. As noted above, the Debtors reserve their rights to file objections to the Lease Claims at a later time on any grounds that bankruptcy or non-bankruptcy law permits.

#### **RESERVATION OF RIGHTS**

25. At this time, the Debtors have not completed their review of the validity of all claims/expenses filed against their estates, including the Lease Claims. Accordingly, the Lease Claims may be the subject of additional subsequently filed objections. To that end, the Debtors reserve the right to further object to any and all claims, whether or not the subject of this Objection, for allowance, voting, and/or distribution purposes, and on any other grounds. Furthermore, the Debtors reserve the right to modify, supplement and/or amend this Objection as it pertains to any claim or claimant herein.

#### **NOTICE AND PROCEDURE**

26. Notice of this Objection has been provided to the Claimants with a claim that is subject

to this Objection as identified on Exhibits B and C, and to other parties-in-interest in accordance with the Court's Order Pursuant to Bankruptcy Code Sections 102 and 105, Bankruptcy Rules 2002 and 9007, and Local Bankruptcy Rules 2002-1 and 9013-1 Establishing Certain Notice, Case Management and Administrative Procedures (Docket No. 130) (the "Case Management Order").

27. Furthermore, the Debtors submit that the following methods of service upon the Claimants should be deemed by the Court to constitute due and sufficient service of this Objection: (a) service in accordance with Bankruptcy Rules 3007, 7004, and 9006; (b) to the extent counsel for a Claimant is not known to the Debtors, by first class mail, postage prepaid, on the signatory of the Claimant's proof of claim form or other representative identified in the proof of claim form or any attachment thereto at least 30 days before the hearing date; or (c) by first class mail, postage prepaid, on any counsel that has appeared on the Claimant's behalf in the Debtors' bankruptcy cases at least 30 days before the hearing date. The Debtors are

serving the Claimants with this Objection and the Exhibit(s) on which the Claimants' claim is listed.

28. To the extent any Claimant timely files and properly serves a response to this Objection by December 14, 2009 as required by the Case Management Order and under applicable law, and the parties are unable to otherwise resolve the Objection, the Debtors request that the Court conduct a status conference with respect to any such responding claimant at the December 21, 2009 omnibus hearing, and thereafter schedule the matter for a future hearing as to the merits of this Objection to the Lease Claims. However, to the extent the Claimant fails to timely file and properly serve a response to this Objection as required by the Case Management Order and applicable law, the Debtors request that the Court enter an order, substantially in the form attached hereto as Exhibit A, reclassifying as a general unsecured non-priority claim in the same amount as the asserted Lease Claims.

**COMPLIANCE WITH BANKRUPTCY RULE 3007 AND  
THE OMNIBUS OBJECTION PROCEDURES ORDER**

29. This Objection complies with Bankruptcy Rule 3007(e) in that this Objection includes less than 500 claims. See Rule 3007(e)(1) and (2). Additionally, the Debtors submit that this Objection is filed in accordance with this Court's Order Establishing Omnibus Objection Procedures and Approving the Form and Manner of Notice of Omnibus Objections (Docket No. 2881) (the "Omnibus Objection Procedures Order").

**WAIVER OF MEMORANDUM OF LAW**

30. Pursuant to Local Bankruptcy Rule 9013-1(G), and because all issues of law are presented in the Objection, the Debtors request that the requirement that all motions be accompanied by a written memorandum of law be waived.

**NO PRIOR RELIEF**

31. No previous request for the relief sought herein has been made to this Court or any other court.



WHEREFORE, the Debtors request the Court to enter the Order sustaining this Objection and granting such other and further relief as the Court deems appropriate.

Dated: Richmond, Virginia SKADDEN, ARPS, SLATE, MEAGHER  
November 20, 2009 & FLOM, LLP  
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MCGUIREWOODS LLP

/s/ Douglas M. Foley  
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Counsel for Debtors and  
Debtors in Possession

**EXHIBIT A**

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Counsel to the Debtors and  
Debtors in Possession

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

- - - - - x  
In re: : Chapter 11  
:   
CIRCUIT CITY STORES, INC., : Case No. 08-35653 (KRH)  
et al., :   
:   
Debtors. : Jointly Administered  
- - - - - x

**ORDER SUSTAINING DEBTORS' SIXTY-FIRST OMNIBUS OBJECTION  
(RECLASSIFICATION OF CERTAIN ALLEGED 503(B)(9) CLAIMS TO  
GENERAL UNSECURED, NON-PRIORITY CLAIMS)**

THIS MATTER having come before the Court on the  
Debtors' Sixty-First Omnibus Objection (Reclassification  
of Certain Alleged 503(b)(9) Claims to General  
Unsecured, Non-priority Claims) (the "Objection"), which

requested, among other things, that the claims specifically identified on Exhibit c attached to the Objection be reclassified as general unsecured, non-priority claims for those reasons set forth in the Objection; and it appearing that due and proper notice and service of the Objection as set forth therein was good and sufficient and that no other further notice or service of the Objection need be given; and it further appearing that no response was timely filed or properly served by the Claimants being affected by this Order; and it appearing that the relief requested in the Objection is in the best interest of the Debtors, their estates and creditors and other parties-in-interest; and after due deliberation thereon good and sufficient cause exists for the granting of the relief as set forth herein,

IT IS HEREBY ORDERED ADJUDGED AND DECREED THAT:

1. The Objection is SUSTAINED.
2. The Claims identified on Exhibit C (as attached hereto and incorporated herein) are reclassified as general unsecured, non-priority claims.

3. The Debtors' rights to amend, modify, or supplement the Sixty-First Omnibus Objection, to file additional objections to any claim, including the Lease Claims, (filed or not) that have been or may be asserted against the Debtors, and to seek reduction of any claim to the extent such claim has been paid, are preserved.

4. The Debtors shall serve a copy of this Order on the claimants included on the exhibit to this Order on or before five (5) business days from the entry of this Order.

5. This Court shall retain jurisdiction to hear and determine all matters arising from or relating to this Order.

Dated: Richmond, Virginia  
December\_\_\_\_\_, 2009

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HONORABLE KEVIN R. HUENNEKENS  
UNITED STATES BANKRUPTCY JUDGE

WE ASK FOR THIS:

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/s/ Douglas M. Foley  
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(804) 775-1000

Counsel to the Debtors  
and Debtors in Possession

**CERTIFICATION OF ENDORSEMENT UNDER LOCAL RULE 9022-1(C)**

Pursuant to Local Bankruptcy Rule 9022-1(C), I  
hereby certify that the foregoing proposed order has  
been endorsed by or served upon all necessary parties.

/s/ Douglas M. Foley  
Douglas M. Foley

In re: Circuit City Stores, Inc, et al.  
Case No. 08-35653 (KRH)

Debtors' Sixty-First Omnibus Objection (Reclassification of Certain Alleged 503(B)(9)  
Claims to General Unsecured, Non-Priority Claims)

Exhibit B - Claimants and Related Claims Subject To Sixty-First Omnibus Objection to Claims

Claim Holder	Claim	Exhibit
PENSKE	13374	EXHIBIT C - (RECLASSIFICATION OF CERTAIN ALLEGED 503(B)(9) CLAIMS TO GENERAL UNSECURED, NON-PRIORITY CLAIMS) - MODIFIED
SNO WHITE DUST CONTROL SERVICE	657	EXHIBIT C - (RECLASSIFICATION OF CERTAIN ALLEGED 503(B)(9) CLAIMS TO GENERAL UNSECURED, NON-PRIORITY CLAIMS) - MODIFIED

EXHIBIT C

CLAIM TO BE MODIFIED	CLAIM AS DOCKETED*	CLAIM AS MODIFIED
Claim: 13374 Date Filed: 06/15/2009 Docketed Total: \$181,199.83 Filing Creditor Name and Address: PENSKE PO BOX 827380 PHILADELPHIA, PA 19182	Claim Holder Name and Address  PENSKE PO BOX 827380 PHILADELPHIA, PA 19182  <u>503(b)(9)</u> <u>Reclamation</u> <u>Admin</u> <u>Secured</u> <u>Priority</u> <u>Unsecured</u> \$181,199.83	Case Number: 08-35653  Modified Total: \$181,199.83  <u>503(b)(9)</u> <u>Reclamation</u> <u>Admin</u> <u>Secured</u> <u>Priority</u> <u>Unsecured</u> \$181,199.83
Claim: 657 Date Filed: 12/08/2008 Docketed Total: \$390.74 Filing Creditor Name and Address: SNO WHITE DUST CONTROL SERVICE PO BOX 1630 HOLLYWOOD, FL 33022	Claim Holder Name and Address  SNO WHITE DUST CONTROL SERVICE PO BOX 1630 HOLLYWOOD, FL 33022  <u>503(b)(9)</u> <u>Reclamation</u> <u>Admin</u> <u>Secured</u> <u>Priority</u> <u>Unsecured</u> \$390.74	Case Number: 08-35653  Modified Total: \$390.74  <u>503(b)(9)</u> <u>Reclamation</u> <u>Admin</u> <u>Secured</u> <u>Priority</u> <u>Unsecured</u> \$390.74
		<b>Total Claims To Be Modified: 2</b>  <b>Total Amount As Docketed: \$181,590.57</b>  <b>Total Amount As Modified: \$181,590.57</b>

\* "UNL" denotes an unliquidated claim.